UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

DALE A. "JustTheJUDGE1" "Sinz" DROZD, *Petitioner* **-against-** THE UNITED STATES HOUSE OF REPRESENTATIVES *Respondents*	**Case No.** 4:23-cv-0035M/QWT **Before** Qwerty, Chief Judge

OPINION AND ORDER ON A MOTION FOR A PRELIMINARY INJUNCTION, SUA SPONTE DISMISSAL IN PART AND PARTIAL ENTRY OF SUMMARY JUDGMENT SUA SPONTE

The Plaintiff-Movant *pro se*.

Squnqs, *Esq*., for the defendant-nonmovant.

Before QWERTY, Chief Judge, U.S. District Court for the District of Columbia:

The action today involves a congressional subpoena issued to the plaintiff, Dale A. "JustTheJudge1" "Sinz" Drozd ("Sinz"), by the Committee of the U.S. House of Representatives. The plaintiff is a Justice of the United States Supreme Court. The defendant House explained, through its agent, the Speaker *pro tempore*, Mr Siad Minaj, that it had decided to commence an inquiry into potential misconduct and ethics concerns relating to the Supreme Court, and especially that of the plaintiff. Without being able to ascertain what he is allegedly accused of with pinpoint accuracy, we nevertheless have been able to

broadly understand that the House of Representatives attempts, through its subpoena to the defendant, as well as to other persons, including two other Justices of the Supreme Court. The plaintiff attempts to challenge the validity of the subpoena with which he has been served. We issued a 72-hour temporary restraining order on the 29th November 2023 enjoining the defendant from enforcing its subpoena against the plaintiff, barely half an hour before the hearing was intended to commence. Following a comprehensive preliminary injunction hearing, we also invited the parties to express their view on entry of summary judgment *sua sponte*, and in order to allow the court to fully consider the issues, extended the temporary restraining order by another day. We discuss this *infra*. Since both the preliminary injunction and the summary judgment revolve heavily around the merits of the action, we will address these once, in a single consolidated part of our judgment, see Part II.

I

A

In this circuit, "[a] district court facing a request for a preliminary injunction must balance four factors: (i) whether the party seeking the injunction is likely to succeed on the merits of the action, (ii) whether the party is likely to suffer irreparable harm without an injunction, (iii) whether the balance of equities tips in the party's favor, and (iv) whether an injunction would serve the public interest." *Doe v. Mattis*, 928 F.3d 1, 7 (D.C. Cir. 2018). "If the government is the party sought to be enjoined, the public interest and balance of equities factors merge." *MediNatura, Inc. v. Food & Drug Admin.*, 998 F.3d 931, 945 (D.C. Cir. 2021). We can even take this simplification exercise a step further, and say that because in such a case the merged public interest/balance of

equities prong is essentially a process of "weighing the benefits to the private party from obtaining an injunction against the harms to the government and the public from being enjoined" *Mattis*, 928 F.3d at 23, and "there is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations" *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (quoting in part *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994)) (internal quotation marks omitted), this prong of preliminary injunction is, as a general rule, essentially an amalgamated reflection of the other two. Even so, we must ensure that analysis of this prong, where applicable is "complete" *Gordon v. Holder*, 632 F.3d 722, 725 (D.C. Cir. 2011). Lastly, we address the issue of delay, raised by the defendant. This Court briefly discussed this issue in *Maxonymous v. United States*, where we explained that a delay in filing is not a proper basis [*ipso facto*] for denial of a preliminary injunction … but merely relevant in considering one's entitlement to injunctive relief because delay indicates a lack of irreparable harm" 2 A.A.Dig. _____, 4:23-CV-0018A/QWT, slip op. at 7 (D.D.C. 13 Oct. 2023), https://archive.org/details/maxonymous-v-us-prelim-inj-1/ (alteration in original) (quoting in part *Gordon v. Holder*, 632 F.3d 722, 724 (D.C. Cir. 2011)) (internal quotation marks omitted).

B

We look next at the summary judgment. We do of course have this power, subject to certain conditions, *cf. Sibley Memorial Hospital v. Wilson*, 488 F.2d 1338, 1343-44 (D.C. Cir. 1973) ("Trial judges are not, of course, without the power to enter summary judgment sua sponte."). Whilst we are allowed to enter summary judgment sua sponte, we should always give the losing party a "a full opportunity to conduct

discovery" *Athridge v. Rivas*, 141 F.3d 357, 362 (D.C. Cir. 1998), and a notice "to come forward with all [his] evidence" *Id.*, at 361, *accord Farouki v. Petra Int'l Banking Corp.*, 705 F.3d 515, 517 (D.C. Cir. 2013) (Noting that the court must always give the losing party "notice [and an] opportunity to respond"). In this action, the losing party voluntarily agreed to the summary judgment proceeding, explaining that it "would be great". We gave both parties the opportunity to present evidence and arguments on the summary judgment.

We proceed next to explain our belief as to why summary judgment is appropriate. They are "are sufficiently familiar as to require only brief restatement." *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1288 (D.C. Cir. 1998), namely, "a party is only entitled to summary judgment if the record, viewed in the light most favorable to the nonmoving party, reveals that there is no genuine issue as to any material fact" *Id.* Like most Circuits, ours points out that "[t]he mere existence of some alleged factual dispute between the parties will not defeat summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Holcomb v. Powell*, 433 F.3d 889, 895 (D.C. Cir. 2006) (quoting in part *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)) (internal quotation marks omitted). Lastly, we note briefly in passing that we originally intended to dismiss the matter sua sponte for failure to state a claim, but "when a district court … looks outside the complaint to factual matters, [it] must convert a motion to dismiss into a motion for summary judgment" *Marshall County Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993), although this requirement does not extend to cases where the Court considers "only the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which [the court] may take judicial notice."

Hurd v. Dist. of Columbia, 864 F.3d 671, 678 (D.C. Cir. 2017) (quoting *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997). In the case at bar, this Court has not only had regard to that material – most notably, we have considered the arguments raised to the court, and answers to questions given by Mr Minaj, within the context of the preliminary injunction hearing.

Summary judgment is, to our mind, clearly appropriate here, for a few reasons. First of all, there are no particular disputes as to fact. None of the parties can reasonably dispute that a subpoena was issued, nor does anyone materially dispute the factual context given to us by Mr Minaj. At best, there is a question of what Congress apparently is seeking to achieve through issuing a subpoena to the plaintiff, but for reasons we set out *infra*, this is either here nor there, for it is either immaterial or nonjusticiable anyway. Second, because we deny the preliminary injunction, and would do so even disregarding the merits, declining to enter summary judgment would, most likely, have the effect as a practical matter of rendering the rest of the action moot – that is to say that even if we were nominally to only decide the preliminary injunction issue, we would effectively be entering judgment. Third, a preliminary injunction inherently requires us to examine the merits of the action – since the action is of such a nature that it is amenable to be resolved on the merits here and now, doing so will simply promote judicial economy and "just [and] speedy" resolution of the action. Fed. R. Civ. P. 1. Lastly, we observe that most of the subpoena cases we cite later on on this opinion, as well as others, were disposed of in the District Court by summary judgment. *Cf. Comm. on Judiciary v. McGahn*, 415 F. Supp. 3d 148, 164 (D.D.C. 2019) (Explaining that "it is understood and undisputed that the question of whether or not the Constitution empowers one of the

branches of government to act in a certain way is a pure question of law[.]") (citation omitted) (internal quotation marks omitted); *Trump v. Mazars*, 560 F. Supp. 3d 47 (D.D.C. 2021); *Committee on Judiciary v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008); *U.S. v. American Tel. Tel. Co.*, 419 F. Supp. 454 (D.D.C. 1976).

II

A

We start with the question of sovereign immunity. Whilst originally we had no intent to discuss this matter, "it is not proper for federal courts to proceed ... to a merits question despite jurisdictional objections." *Bronner ex rel. Am. Studies Ass'n v. Duggan*, 962 F.3d 596, 612 n.11 (D.C. Cir. 2020) (quoting *In re Madison Guar. Sav. & Loan Ass'n*, 173 F.3d 866, 870 (D.C. Cir. 1999) (per curiam)), and since "sovereign immunity is jurisdictional in nature," *Sierra Club v. Wheeler*, 956 F.3d 612, 616 (D.C. Cir. 2020) (internal quotation marks omitted), we must "reach[] the merits only after resolving the disputed immunity question" *Mowrer v. United States Dep't of Transp.*, 14 F.4th 723, 734 (D.C. Cir. 2021).

Essentially, sovereign immunity is an elaborate doctrine which gives effect to the general notion that "[t]he United States and its agencies are generally immune from suit in federal court absent a clear and unequivocal waiver of sovereign immunity." *Crowley Gov't Servs. v. Gen. Servs. Admin.*, 38 F.4th 1099, 1105 (D.C. Cir. 2022). As best as we can tell, the only time in which a Federal court has discussed the question of sovereign immunity in the congressional subpoena context was in *Walker v. Jones*, where our Court of Appeals suggested that the APA, specifically 5 U.S.C. § 702, which "waives sovereign immunity for "[a]n action in a court of the United States seeking relief other than

money damages.'" *Schindler Elevator Corp. v. Wash. Metro. Area Transit Auth.*, 16 F.4th 294, 301 (D.C. Cir. 2021), extends to a Congressional subpoena. 733 F.2d 923, 928 n.6 (D.C. Cir. 1984) (Explaining "in 1976, Congress eliminated sovereign immunity as a defense in all equitable actions for specific, non-monetary relief against a United States agency or officer acting in an official capacity") (Citing 5 U.S.C. § 702). See also *Nixon v. U.S.*, 938 F.2d 239 (D.C. Cir. 1991) (action by impeached and convicted judge against Congress challenging his conviction not barred by sovereign immunity under waiver by the APA). Indeed, because it is a jurisdictional issue, and so both appellate and trial courts "must assure [themselves] that [the plaintiff's] claims fall within a valid waiver of sovereign immunity before allowing the suit to proceed" *Sierra Club*, 956 F.3d, at 616, we deduce that whether under the theory espoused under *Walker*, which seems to us to be apt, or under another theory, the mere fact that, out of several dozen judges, none of them saw fit to even address the issue appears to our mind to confort this theory.

B

We look now to the merits of the action. Most of the recent authorities regarding congressional subpoenas in this Circuit appear to relate, to a greater or lesser degree, to one specific controversial businessman, television presenter and, in his "retirement", politician. Whilst there may be learned disagreement about his wider contribution to the American legal system, there, we think can be none that our task today has been considerably altered by a relative wealth of closely pertinent, and refreshed, authorities. As our Court of Appeals held in one such case, "it has long been held that the "power of inquiry—with process to enforce it—is an essential and appropriate

auxiliary to the legislative function." *Comm. on Ways & Means v. United States Dep't of Treasury*, 45 F.4th 324, 330 (D.C. Cir. 2022). Because, however, a Congressional subpoena is tied into the "power 'to secure needed information' in order to legislate," *Trump v. Mazars*, 39 F.4th 774, 781 (D.C. Cir. 2022) (*Mazars IV*) (quoting *Trump v. Mazars*, —— U.S. ——, 140 S. Ct. 2019, 207 L.Ed.2d 951 (2020) (*Mazars III*)), "generally means it must "concern[ ] a subject on which 'legislation could be had.'" *Trump v. Thompson*, 20 F.4th 10, 25 (D.C. Cir. 2021) (quoting in part *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 506, 95 S.Ct. 1813, 44 L.Ed.2d 324 (1975)).

The movant here proposes to us a confused theory which seems, at best to summarise itself as "investigations of unlawful actions by an impeachable official cannot proceed through the legislative power" Pl. Civil Complaint. Generally speaking, these views appear to have found some sympathy among at least one Justice of the Supreme Court. *Cf. Mazars III*, 140 S. Ct. 2019, 2045-49 (THOMAS, J., concurring in judgment) and a few dissenting judges (see authorities cited in *Mazars III*). In addition to having other defects of attraction, see *infra*, this argument does not sit especially well with this Circuit's precedent. In *Comm. On Judiciary of U.S. House of Representatives v. McGahn*, 968 F.3d 755 (D.C. Cir. 2020) (en banc) (*McGahn II*), our court of appeals held that the House of Representatives had standing to bring an action to enforce a subpoena issued by it as part of a committee investigation into misconduct of an "impeachable officer", in that instance, the President of the United States. Indeed, impeachment proceedings often start life as a committee inquiry, and the legislature obviously "cannot undertake impeachment proceedings without knowing how the official in question has discharged his or her constitutional responsibilities" *McGahn II*, 968 F.3d at 760. Even staying within the linguistic

framework of "legislation", it appears as if an inquiry into an officer's conduct is not antithetical to the subpoena power. See *Judicial Watch v. Schiff*, 998 F.3d 989, 992 (D.C. Cir. 2021) (Explaining that within the Speech-or-Debate clause context, "the Committee's issuance of subpoenas, whether as part of an oversight investigation or impeachment inquiry, was a *legislative* act") (Emphasis added). Furthermore, we do not understand an argument which appears to imply that Congress must legislate in a Capitol Hill bubble, entirely isolated from the practical reality of the working of government or the needs and interests of the ordinary American citizen. Instead, "it is Congress's "proper duty" to "look diligently into every affair of government and to talk much about what it sees."" *Mazars IV*, 39 F.4th, at 810-11 (quoting in part *United States v. Rumely*, 345 U.S. 41, 43, 73 S.Ct. 543, 97 L.Ed. 770 (1953)).

We recognise, however, that the views expressed by the plaintiff, the *Mazars III* dissent and their relatives, appear to be raised by a vocal and present minority, even though we are not entirely persuaded by these arguments. We nevertheless think it necessary to address these questions. Most of these questions were addressed by the majority in *Trump v. Mazars*, 940 F.3d 710, 737-39 (D.C. Cir. 2019) (*Mazars I*), and so we will endeavour to avoid raising any duplicitous flaw raised therein. We think however that these views encounter several further, and similarly important, flaws. Firstly, none of the dissents actually contest that Congress has a subpoena power both under impeachment proceedings and when conducting a general inquiry. Secondly, none of the dissenters, nor the plaintiff, address the fact that Congressional power cannot be reduced to impeachment, nor do they seem to consistently identify why impeachment proceedings exist. Thirdly, those dissents propose a theory which does not appear

consistent with the separation of powers which they claim to be defending.

We begin with the first issue. THOMAS and RAO, JJ., both recognise that Congress, in impeachment proceedings, is empowered to take steps to hear testimony. The upshot of this distinction is therefore that a person seeking to contest a congressional subpoena, such as our plaintiff for instance, would in effect be invited to challenge the choice of the House of Representatives to conduct impeachment proceedings, or some other form or proceeding. In addition to any – grave – separation of powers issues (we discuss them *infra*), attempting to give effect to such a distinction by judicial enforcement is functionally unworkable, for it is hard for us to see how a hypothetical plaintiff in such an instance would have standing to entertain such a claim, for we find it hard to see the difference between an impeachment inquiry and a general inquiry, and so how he would be injured by such a difference – remember that standing is attached to each claim raised, not "in gross". *City of Bos. Delegation v. FERC*, 897 F.3d 241, 250 (D.C. Cir. 2018) ("Generally, petitioners must "demonstrate standing for each claim [they] seek[ ] to press."") (alteration in original) (quoting in part *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006)).

Whilst THOMAS, J., claims that "[u]nlike contempt, which is governed by the rules of each chamber, impeachment and removal constitutionally requires a majority vote by the House and a two-thirds vote by the Senate", *Mazars III*, 140 S. Ct. 2019 at 2047, this argument, as a practical matter, occults one key problem – Congress begins proceedings on an impeachment before actually voting to impeach, additionally, for reasons we will further explicate later,

because this choice of proceeding will not in fact adversely interfere with impeachable officials fundamental rights, it is in fact a nonjusticiable policial choice. *Cf. Metzenbaum v. Federal Energy Reg. Com'n*, 675 F.2d 1282, 1287-88 (D.C. Cir. 1982). Returning to the fundamental logical fallacy of this argument, before the House reaches the stage of actually voting to impeach an "impeachable official", subpoenas, even under what are normally impeachment proceedings, will have been issued. Indeed, modern practice will often be to first conduct a preliminary inquiry through a committee in view of initiating impeachment proceedings. As a practical matter, the plaintiff's theory will oblige the House of Representatives to effectively take an opportunistic stab in the dark before deciding whether or to vote to impeach a person or not, relying only public domain and voluntarily surrendered information which, inherently, will not serve the very purpose which the dissents claim is that of an "inquest" *Mazars III*, 140 S. Ct. at 2046. The problem with this theory however, is that to the Framers, the word "inquest" meant some variant of a "judicial enquiry or examination", INQUEST, Samuel Johnson's Dictionary (5th Ed. 1773), https://johnsonsdictionary online.com/views/search.php?term=inquest. There can be no meaningful enquiry or examination, on the other hand, if the House of Representatives is required, as the *Mazars III* dissent seems to suggest, to have voted to impeach a person before they can begin evidentiary proceedings. If anything, that will negatively impact an impeachable official's rights, for he will invariably be subjected to a signal of the "gravity" *Mazars III*, 140 S. Ct. at 2047 (2020) (citing *Mazars I*, 940 F.3d, at 776) of the matter from Congress, even when the evidence against the official is, sufficiently serious so as to warrant a

congressional interest, but not so obviously compelling, at that juncture so as to merit impeachment.

Next comes the problem of the allegedly "judicial" nature of impeachment. See for instance *Mazars I*, 940 F.3d at 749 (Impeachment "has always been understood as a limited judicial power to hold certain impeachable officials accountable for wrongdoing"). Simply put, this is not so, or at least and even if it were to be the case, the theory that THOMAS and RAO, JJ. advance contradicts that belief. We begin with the conceptual contradiction. As we explained previously, even continuing with the erroneous analogy, the *Mazars* dissents claim that impeachment is a judicial or quasi-judicial proceeding, in essence one in which, we suppose, the House of Representatives serves as a grand jury of sorts, a comparison which the plaintiff in fact urges us to make. We can, however, find no authority which stands for the strange proposition that a would-be prosecutor (a congressional committee) is not entitled to collect evidence before submitting a cause to the grand jury, or one which stands for the proposition that appropriate authorities, such as law enforcement agencies or prosecutors, who exercise a range of investigatory powers, are required to immediately move to bring charges against every single person they investigate as soon as they discover the first signs of criminal conduct. The implication of a strict reading of this this claim is that some crime prevention strategies and routine police patrols are, apparently, unconstitutional near suspected criminal activity, because they involve a nexus between the judicial power to prosecute and investigate crime, and the general police power of keeping the peace. Secondly, and more fundamentally, the impeachment power is not a judicial power in the ordinary sense of the term. To be sure, it bears many of the hallmarks of a judicial process,

but normally, "[i]mpeachment is viewed as a legislative activity in the sense that it is one of the 'other matters which the Constitution places within the jurisdiction of either House.'" *Penny v. Pelosi*, 538 F. Supp. 3d 850, 856 (C.D. Ill. 2021) (quoting *In re Request for Access to Grand Jury Materials Grand Jury No. 81-1, Miami*, 833 F.2d 1438, 1446 (11th Cir. 1987)). Instead, as our Court of Appeals explains, "[i]mpeachment proceedings in the House of Representatives cannot be analogized to traditional legal processes and even the procedures used by the Senate in "trying" an impeachment may not be like those in a judicial trial." *In re Lindsey*, 158 F.3d 1263, 1277 (D.C. Cir. 1998). Impeachments are not normally amenable to judicial review, *cf. Nixon v. United States*, 506 U.S. 224 (1993). We find limited authority actually pointing to the suggestion that the impeachment power comprises a mandate or implication to act judicially, and a suggestion to do so would imply, contrary to what the *Mazars* dissents claim, a blurring of the separation of power which is unsupported by authority. If anything, the prospect of an impeachment gives Congress broader investigatory powers, not lesser or more restricted ones. Furthermore, as we explained previously, the *Mazars* dissents themselves accept that "initiating impeachment proceedings signals to the public the gravity of seeking the removal of a constitutional officer at the head of a coordinate branch." *Mazars III*, 140 S. Ct. at 2047 (2020) (citing *Mazars I*, 940 F.3d, at 776). We are dubious of how depriving Congress of any ability to inquire into misconduct before initiating a full-scale impeachment inquiry serves that objective.

We move now onto the graver, juridical misconceptions of the *Mazars* dissents. As a fundamental matter, both, and JUDGE RAO in particular, appear to make out a theory according to which Congressional impeachment is a judicial power exclusive of the

legislative power. They then explain that we must in effect oblige Congress to proceed under one of the proceedings open to it and not another. To do so, however, goes emphatically against the grain of the Constitution. Under the Constitution, each House may "determine the Rules of its Proceedings" U.S. Const. art. I, § 5 cl. 2, and "any Speech or Debate in either House, they shall not be questioned in any other Place" U.S. Const. art. I, § 6 cl. 1. The trouble with the plaintiff's logic – and the *Mazars* dissenters' logic – is that they would call on us to do just that. Authorities clearly show that subpoenas fall within the remit of the speech-or-debate clause, *cf. Judicial Watch v. Schiff*, 998 F.3d 989, 992 (D.C. Cir. 2021). This is unsurprising. As this court has explained, "[a]n act is "legislative" if it is "generally done in a session of the House by one of its members in relation to the business before it."" *Republican Nat'l Comm. v. Pelosi*, 602 F. Supp. 3d 1, 18 (D.D.C. 2022) (quoting in part *Kilbourn v. Thompson*, 103 U.S. 168, 204, 26 L.Ed. 377 (1880)). The distinction between an impeachment inquiry and any other enquiry on the other hand, is purely a fruit of the Rules of the two Houses, for the only requirement contained within our Constitution is that the House of Representatives impeach and that the Senate try an impeachment. "Courts must take care not to second-guess the manner in which the House plans to proceed with its impeachment investigation or interfere with the House's sole power of impeachment." *In re Comm. on Judiciary*, 951 F.3d 589, 602 (D.C. Cir. 2020) *vacated as moot sub nom. Dep't of Justice v. House Comm. on the Judiciary*, 142 S. Ct. 46 (2021). The plaintiff, meanwhile, would have us look into the soundness of a decision to, or more likely, not to initiate an impeachment – he would, in other words, ask us to enquire into a matter which we are precluded from inquiring into under the

Speech-or-Debate clause, the Rulemaking clause, and the political question doctrine.

"The principle that the courts lack jurisdiction over political decisions that are by their nature "committed to the political branches to the exclusion of the judiciary" is as old as the fundamental principle of judicial review." *Schneider v. Kissinger*, 412 F.3d 190, 193 (D.C. Cir. 2005). *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), "the fountainhead of the modern political question doctrine" *Al-Tamimi v. Adelson*, 916 F.3d 1, 7 (D.C. Cir. 2019) provides six factors, and "[t]o find a political question, we need only conclude that one factor is present, not all." *Al-Tamimi v. Adelson*, 916 F.3d 1, 12 (D.C. Cir. 2019) (quoting *Schneider*, 412 F.3d at 194). In practice, "two [of the] factors — textual commitment and lack of judicially manageable standards — are the most important" *Harbury v. Hayden*, 522 F.3d 413, 418 (D.C. Cir. 2008). Of course, both of these already work against the plaintiff's theory. As our Constitution reminds us, the House of Representatives enjoys the "sole Power of Impeachment," U.S. CONST. art. I, § 2, cl. 5. Likewise, "[t]he United States Constitution vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States."" *National Maritime Safety Ass'n v. Occupational Safety & Health Administration*, 649 F.3d 743, 755 (D.C. Cir. 2011) (quoting U.S. Const. art. I, § 1). Nobody, we think, disputes that the power to hear testimony and issue congressional subpoenas results from these founts of authority. The exact articulation between the two processes, however, is largely an internal proceeding to Congress. The Rules of each House, not the Constitution, govern most aspects of impeachment proceedings. Moving onto the second prong, whilst we accept that the Framers chose "to permit impeachment of executive officers *only* for "Treason, Bribery, or other high Crimes and Misdemeanors."" and in

doing so "rejected language that would have permitted impeachment for "maladministration"" *Bowsher v. Synar*, 478 U.S. 714, 729 (1986) (emphasis added), we are unwilling to accept the unattractive argument that the Framers intended for the judiciary, and not the legislature, to arbitrarily determine a point past which Congress could only exercise its power through impeachment – much to the contrary, the Framers understood that a democratic legislature could only function without undue interference from the other branches of government. To be sure, "[b]ecause of the Framers' concerns about placing unchecked power in political majorities, the Constitution's majoritarian provisions were only part of a complex republican structure" *Evenwel v. Abbott*, 578 U.S. 54, 85, 136 S. Ct. 1120, 194 L.Ed.2d 291 (2016), but the judicial power extends normally only to controlling the *extrinsic* limits of congressional power – that is to say whether or not Congress, as an institution, has the power to undertake a certain course of action, and if there are conditions on when it may exercise that power, if those are met. As our Court of Appeals explained a while ago, "[t]he courts have no authority to speak or act upon the conduct by the legislative branch of its own business, so long as the bounds of power and pertinency are not exceeded, and the mere possibility that the power of inquiry may be abused affords no ground for denying the power" *Barsky v. United States*, 167 F.2d 241, 250 (D.C. Cir. 1948) (quoting in part *McGrain v. Daugherty*, 273 U.S. 135, 175-76 (1927)) (internal quotation marks omitted). As to the internal workings of Congress, and whether it proceeds with an inquiry defined under one part of its Rules of Procedure or another, on the other hand, is quite simply none of the judiciary's business, as we cannot and will not decide matters revolving purely around "internal rules" *McCarthy v. Pelosi*, 5 F.4th 34, 41 (D.C. Cir. 2021) of Congress, for that "falls

comfortably within the immunity afforded by the Speech or Debate Clause" *Id*. Of course, we will readily enquire into the *purely administrative* functions of Congress, such as catering services, *Walker v. Jones*, 733 F.2d 923 (D.C. Cir. 1984), or employment litigation relating to Congressional staffers, *Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1 (D.C. Cir. 2006), but this is not one of them. Impeachment and congressional inquiries are indisputably both forms of legislative conduct, *cf*. *Judicial Watch*, 998 F.3d, *supra*, at 992. Whilst to a legislator there are as many forms of legislative process as the Rules of his House allow, for this Court, there is, at least for our purposes today, only one.

Moreover, even supposing that we do indeed have the power to enforce a requirement that Congress proceed under a formal, albeit preliminary, "impeachment inquiry", whatever, the plaintiff and *Mazars* dissents attempt to mean by that, we quickly reach a practical limit to how such a creative theory could be practically enforced. "[T]he respect that courts owe other organs of government should make us wary of impugning the motivations that underlie a legislature's actions." *National Black Police v. District of Columbia*, 108 F.3d 346, 352 (D.C. Cir. 1997). Instead, we are affirmatively warned against it. As our Court of Appeals explained in *Comm. on Ways & Means*:

> "[I]n determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it." *Eastland*, 421 U.S. at 508, 95 S.Ct. 1813. The Speech or Debate Clause, U.S. Const. art. 1, § 6, cl. 1, protects against inquiry into the motives behind the regular course of the legislative process, *Eastland*, 421 U.S. at 508, 95 S.Ct. 1813. It is not our function to "test[ ] the motives of committee members for this purpose."

> *Watkins* [*v. United States*, 354 U.S. 178, 200, 77 S.Ct. 1173, 1 L.Ed.2d 1273 (1957)]. "Their motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served." *Id.*

45 F.4th, at 330, *accord Judicial Watch*, 998 F.3d at 992 ("The wisdom of congressional approach or methodology is not open to judicial veto.") (quoting *Eastland*, 421 U.S. at 509, 95 S.Ct. 1813); *Brown v. Califano*, 627 F.2d 1221, 1235 n.78 (D.C. Cir. 1980) ("The courts "will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."") (quoting in part *United States v. O'Brien*, 391 U.S. 367, 383, 88 S.Ct. 1673, 1682, 20 L.Ed.2d 672 (1968)).

Without inquiring into these motives, however, the distinction that the plaintiff would have us make between investigating impeachment and making wider inquiries into the function of a part of the judicial or executive branches would become largely inoperative, and lead to mostly unhelpful consequences, principally one of two outcomes. The first possible outcome is that we would be required to compel Congress, at the "first scent of potential illegality" *Mazars I*, 940 F.3d, at 737, to move entirely into impeachment, preventing, in effect, Congress from doing anything other than fixating its investigations around one person and his misconduct to the detriment of addressing wider questions, or the involvement of others. Alternatively, if Congress cannot or does not believe it appropriate to bring impeachment proceedings, whether at all or at that juncture, it apparently can stop its inquiry altogether, or, according to the *Mazars* dissents, there is apparently a distinct third option, namely that "the Committee's inquiry into legislative proposals may continue in any number of

legitimate directions" *Mazars I*, 940 F.3d at 771 (RAO, J., dissenting). This of course, at face value, is true – Congress can of course choose how it wishes to inquire and what it wishes to inquire into. That said, not inconsiderable difficulty arises when attempting to discern the – obviously synthetic – difference between a general inquiry not aimed at exploring a single officer's misconduct and the general dysfunction or practices of an institution, especially when that institution consists of only one, or a few officers, or is dominated by the officer believed to have misconducted himself. Given that we cannot inquire into motive, both out of separation-of-powers considerations and as a practical matter, since in doing so we would have to interrogate the individual motives of a two- or three-figure number of legislators individually, the court would functionally be requiring Congress to make a formalistic statement that the investigatory measure it is undertaking is not made with a view to probing the conduct in office of individual officers. The Court is not actually sure what effect such a declaration would have on genuinely protecting the rights of anyone, and it is not without reason that our Court of Appeals has reminded us that "[i]n times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies." *McSurely v. McClellan*, 553 F.2d 1277, 1337 (D.C. Cir. 1976).

We proceed next under the normal framework which this Circuit has applied to congressional subpoenas. As our Circuit has explained, "there is no congressional power to expose for the sake of exposure" *Trump v. Thompson*, 20 F.4th 10, 25 (D.C. Cir. 2021) (quoting *Watkins*, 354 U.S. at 200, 77 S.Ct. 1173), and merely "call[ing] conduct it does not like to the attention of the public" *U.S. v. Poindexter*, 698 F. Supp. 300, 304 n.5 (D.D.C. 1988) is not an objective for which Congress may

use its investigatory powers. The threshold question, in essence, is "whether the subpoena is being used to inform the exercise of a legitimate Congressional power", namely one on which "on which legislation could be had" *McSurely v. McClellan*, 521 F.2d 1024, 1038 (D.C. Cir. 1975). The remaining question, therefore, is whether judicial misconduct falls within either or both of the Congress' powers, both of impeachment and of undertaking general legislative enquiries. The impeachment prong of the matter is self-explanatory – the only way in which we could hold that Congress does not have power to enquire into the matter under that head of its authority would be to suggest that it has no power to enquire into misconduct at all. In any event, even on the ground of a general legislative enquiry, we hold that the matter does indeed fall within the ambit of Congress' powers.

Whilst we accept that the judicial code of ethics clearly is not the fruit of Congress' work, it is clear to our mind that the Congress, as a general matter, has the power, as it has done, to make diverse regulations about Federal courts and judges sitting in them in order to promote the probity of the judiciary. It may, for example, prevent judges from practicing law, 28 U.S.C. § 454, require that he recuse, 28 U.S.C. § 455, require him to file a public financial declaration, 5 U.S.C. § 13103(f)(11), and it may even create a procedure for judicial discipline, 28 U.S.C. § 351 *et seq*. There are clearly nonfrivolous academic arguments which stand for the proposition that the Congress has "broad, but not unlimited, authority to regulate the Supreme Court Justices' ethical conduct" Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 Geo. J. Legal Ethics, 443, at 478 (2013). Barely a day ago, the Senate Judiciary Committee issued a subpoena not at all unlike the one at bar. *Cf.* Carl Hulse, *Senate Panel Approves Subpoenas in Supreme Court Ethics Inquiry*, N.Y. Times (Nov. 30,

2023), https://www.nytimes.com/2023/11/30/us/politics/senate-supreme-court-subpoenas.html. When answering the question of whether or not legislation may be had, we must of course recognise that we are not seised of a constitutional challenge to legislation actually providing for legal ethics requirements, but merely at the early stages of Congress' taking of an interest in the matter. The question therefore cannot be "is a hypothetical precise enactment within the powers of Congress", but "can the purpose conceivably be one falling within Congressional power" – indeed Congress' inquiries may well guide it to develop and alter its understanding of a workable scheme of judicial discipline. Likewise, and as is consistent with the very broad powers of Congress, "[i]t does not lie with this Court to say when a congressional committee should be deemed to have acquired sufficient information for its legislative purposes." *Doe v. McMillan*, 459 F.2d 1304, 1314 n.16 (D.C. Cir. 1972) (quoting *Hutcheson v. United States*, 369 U.S. 599, 619, 87 S.Ct. 1005, 1015, 8 L.Ed. 2d 137 (1962)), *aff'd in part and rev'd in part on other grounds*, 412 U.S. 306 (1973).

Finally, we address the plaintiff's suggestion that a subpoena should be likened to a bill of attainder. The Bill of Attainder argument is neither here nor there. "Under the now prevailing case law, a law is prohibited under the bill of attainder clause if it (1) applies with specificity, and (2) imposes punishment." *Foretich v. U.S.*, 351 F.3d 1198, 1217 (D.C. Cir. 2003) (quoting in part *BellSouth Corp. v. FCC*, 162 F.3d 678, 683 (D.C. Cir. 1998)) (internal quotation marks omitted). The trouble, fairly obviously, is that a subpoena does not impose punishment – the plaintiff does explain how the fact that he is being subjected to a process that countless others have been, admittedly at times before a hostile body, whether that be a court or a Congressional committee, is a punishment, nor is a theory of how being asked to

answer questions about a public body – the Supreme Court – of which he is a member and the way it allegedly malfunctions is assimilable to punishment. In fact, were we to accept the theory that a subpoena – being compelled to give oral testimony – constitutes punishment, then every single senior public official could escape testimony for dysfunction of the administration on the basis of a Bill of Attainder, and, in fact, every single witness unwilling to co-operate with a court could probably make the same argument. This, of course, defeats the entire objective of a scheme of compulsory process able to require that a person give testimony.

C

As a final merits issue, we address, albeit very briefly, the argument by which the fact that the Congress did not actually vote to issue the subpoena invalidates it on that ground alone. This perhaps is just about the only theory which gives the *prima facie* appearance of one which reasonably could be entertained at all.

Whilst it is obviously true that in normal circumstances, "individual Members cannot unilaterally exercise the House's implied power to issue subpoenas (at least absent a delegation), just as they cannot unilaterally exercise Congress's express power to, say, regulate interstate commerce" *In re Sealed Case*, No. 23-3001, at *32 (D.C. Cir. Sep. 5, 2023) (KATSAS, J., concurring), the circumstances here are somewhat different. When delegated, "[t]he power to issue a subpoena "may be exercised by a committee acting ... on behalf of one of the Houses" of Congress." *McGahn II*, 968 F.3d, at 767 (quoting in part *Eastland*, 421 U.S., at 505).

This Circuit has held before that "[t]o issue a valid subpoena, however, a committee or subcommittee must conform strictly to the resolution establishing its investigatory powers, and only those parties expressly authorized to sign subpoenas may do so validly. For example, where the resolution granting subpoena power to a committee stated that subpoena would be issued only by the whole committee, not even the Chairman himself could individually issue such a document" *Exxon Corp. v. FTC*, 589 F.2d 582, 592 (D.C. Cir. 1978). Contrariwise, there are no authorities which stand for the proposition that Congress can *never* delegate the subpoena power to a single member, like a chairman or a speaker *pro tempore*, or that it *must* vote on a subpoena, *a fortiori* by way of a vote of the whole House, but only that the delegating body must have approved the delegation by a majority. *Cf. Maloney v. Murphy*, 984 F.3d 50, 67 (D.C. Cir. 2020) (retracing a chain of delegations ultimately to a single member); *Ashland Oil, Inc. v. FTC*, 548 F.2d 977, 990 (D.C. Cir. 1976) (MACKINNON, J., dissenting) ("When Congress was reforming committee practices [in the early 1970s] by providing safeguards against abuses in the issuance of subpoenas by committees, they were well advised to require a vote by a majority of the members of a committee for the issuance of subpoenas. Subpoenas are very powerful weapons and capable of much abuse. The instant subpoenas are a good example of the tremendous power that may be exercised by Congress through these investigatory instruments … *[but if] the House does not wish to require a vote of a majority of the members of a committee before issuing such an intrusive document, the House can easily change the rule*.") (emphasis added).

Of course, we agree with MACKINNON, J. that it is certainly good policy for Congress not to leave the power of the subpoena in the hands of a single person. We also agree that it is important that the subpoena

power must be protected against "a wayward committee acting contrary to the will of the House" *United States v. AT&T*, 551 F.2d 384, 393 (D.C. Cir. 1976), and that a "vote assures the witness some safeguard against aberrant subcommittee or committee demands" *Id.*, at 394 n.16, but in drafting the Rulemaking Clause, our Framers "clearly reserve[d] to each House of the Congress the authority to make its own rules" *Barker v. Conroy*, 921 F.3d 1118, 1130 (D.C. Cir. 2019) (quoting *United States v. Rostenkowski*, 59 F.3d 1291, 1306–07 (D.C. Cir. 1995)), and the only time at which we will even contemplate intruding upon that power is if it clearly exceeds the ambit of Congress' power, and none of the authorities that we have been able to find today appear to support the – lofty – claim that the delegation of the Congressional subpoena power, when done in the normal fashion, is in excess of the powers of Congress. To be sure, it is not a sound exercise of judgment to allow single persons to exercise on behalf of the whole nation – and that is indeed what Congress is invested by our Constitution to do, *cf. Rumely v. United States*, 197 F.2d 166, 173 (D.C. Cir. 1952) ("[Congress] represents the people, and its power comes from the people. It is not a source or a generator of power; it is a recipient and user of power.") – and, *arguendo*, to some extent, a plaintiff subjected to an abusive subpoena is insulated from the most egregious forms of harassment since it is likely that such would impose an undue burden upon him to comply, and perhaps this Court may one day hear a challenge against subpoenas issued by one legislator against another person out of motives extraneous to *bona fides* legislative activity, but none of these are reasons *ipso facto* to question the validity of this subpoena.

We wish to raise in passing that there remains an open question as to whether the Congress can "ratify" an initially defective subpoena, *cf.*

Trump v. Mazars, 941 F.3d 1180, 1182 (D.C. Cir. 2019) [*Mazars II*] (KATSAS, J., dissenting) ("This Circuit has not determined whether a defective subpoena can be revived by after-the-fact approval."), and notably in this instant case by voting to hold the plaintiff in contempt of Congress, see https://trello.com/c/Ze34uD5Z/91-h-res-2-just thejudge-1-contempt-of-congress. A previous dissent raised this question as well, *Ashland*, 548 F.2d, at 991 (MACKINNON, J., dissenting). We need not definitively resolve this issue for reasons we will explain *infra*.

There is, however still a further complication, in that before us, Mr Minaj explained that there were nearly no procedures in place governing the issuance of a subpoena. This state of affairs is particularly interesting and rather novel. Neither party was able to fully enlighten us as to how subpoenas are actually issued by the House of Representatives, for there are no written procedures. We must therefore supplement the mostly undisputed explanations at our bar with judicial notice of information contained in government websites, and Congressional records themselves. Doing so is very much the work of a detective, albeit one who only follows paper trails of public records. As best as this Court can tell, the House of Representatives at our bar, "our" House so to speak, no subpoena has been issued during this Congress. All we have nevertheless have been able to find a somewhat antiquated copy of House Rules, https://drive.google.com/file/d/1FbHNMiol3zGNrXdHA3I2LFInL6ef3Vsy/view, which provide for the chairman of a committee's faculty of issuing subpoenas, and a resolution proposing to amend the Rules so as to make provision for Committee delegation of powers to its Chair, https://trello.com/c/C7Kglenx/9-h-r-30-i-subpoena-and-hearings. Of course, the somewhat obvious difficulty here is that it is well

understood that "the House is not a continuing body" *Miers*, 558 F. Supp. 2d, at 97, and "[t]he House Rules are adopted at the start of each Congress via a House of Representatives resolution" *Jewish War Veterans of U.S., Inc. v. Gates*, 522 F. Supp. 2d 73, 78 n.3 (D.D.C. 2007). Whilst we do not think, and can cite diverse authorities on legislatures generally to this point, that this *ipso facto* prohibits the carrying over of rules from past Congresses, but it is settled Congressional practice that "[t]he power of each House of Representatives to make its own rules may not be impaired or controlled by the rules of a preceding House" *Jefferson's Manual and Rules of the U.S. House of Representatives* §§ 59, p. 186 (2021) [*Jefferson's Manual*], https://www.govinfo.gov/content/pkg/HMAN-117/xml/HMAN-117.xml, and that "[b]efore the adoption of rules, the statutory enactments incorporated into the rules of the prior Congress as an exercise of the rulemaking power do not control the proceedings of the new House until it adopts rules incorporating those provisions" *Id.*, at § 60. "[T]he Court must give great weight to [Congress's] ... construction of its own rules" *Barker*, 921 F.3d, at 1130 (D.C. Cir. 2019) (quoting *United States v. Smith*, 286 U.S. 6, 33, 52 S.Ct. 475, 76 L.Ed. 954 (1932)) for "interpreting a congressional rule differently than would the Congress itself is tantamount to making the Rules—a power that the Rulemaking Clause reserves to each House alone." *Id.* (quoting in part *Rostenkowski*, 59 F.3d, at 1306–07) (internal quotation marks omitted). We cannot, therefore, impose what *we* think is the right construction of Congress' rules upon it. Our only task, therefore, is to understand how "general parliamentary law" governs subpoenas. "General parliamentary law is not a written set of procedures but represents instead the customs and precedents common to all legislative bodies." C. Johnson et al., 1 *Precedents of the U.S. House of*

Representatives 59 (2017) [*Precedents of the House*]. The House also "looks to [*Jefferson's Manual*] as one source for common parliamentary principles, as well as the rules, precedents, and traditions of the House in prior Congresses." 2 *Precedents of the House* 28. Unsurprisingly, the question of a Committee subpoena has never arisen before the adoption of Rules, normally because Rules are adopted almost immediately after the House first sits.

The question is therefore not altogether as straightforward as it seems. *Jefferson's Manual* explains that "witnesses are summoned in pursuance and by virtue of the authority conferred on a committee by the House to send for persons and papers. Even in cases wherein the rules give to certain committees the authority to investigate without securing special permission, authority must be obtained before the production of testimony may be compelled … A committee may also delegate the authority to issue subpoenas to the chair of a full committee. Authorized subpoenas are signed by the chair of the committee or by any other member designated by the committee", at § 342. See also Erskine May, discussing the long-held powers of the Westminster Parliament, and explaining that "formal use of [the] power to summon witnesses or order the production of documents previously always required an order of the House itself", until in more recent times delegating to "committees the power to 'send for persons, papers and records'" T.E. May, *Erskine May: Parliamentary Practice* § 40.17 (25th ed. 2019). It appears to the Court as if the generalised power to all the Committees to take evidence by subpoena was first granted in 1974, and followed three years later by the power to further subdelegate to the chair of the committee. *Cf. Jefferson's Manual*, at § 805. We can find a wealth of authority for the proposition that Committees generally may subpoena individuals of their own

initiative, and most of the Congressional precedents appear to be, motivated in large part by the fact that our Circuit has made it clear that subpoenas issued in violation of the rules of the House are invalid, deeply attached to the notion that the committee must actually be quorate and meet formally prior to the issuance of a subpoena. See 4 *Deschler's Precedents* 2404 (citing *Shelton v. United States*, 327 F.2d 601 (D.C. Cir. 1963) [*Shelton II*]). In support of the suggestion that committees generally delegate authority to issue subpoenas to their chairs, we find that several recent cases involving congressional subpoenas, see e.g. *Murphy*, 984 F.3d, at 67, and a certain number of Committee Rules. *Cf.* Rule 12(g), Rules of the Comm. on Oversight & Gov't Reform of the U.S. House of Representatives, 118th Cong. (2023); Rule IV(a), Rules of the Committee on the Judiciary of the U.S. House of Representatives, 118th Cong. (2023); Rule VII(a), Rules of the Committee on Homeland Security of the U.S. House of Representatives, 118th Cong. (2023), but even so, the power is of course one of the House as a whole, and there can be no personal legislator's interest therein. *Maloney v. Carnahan*, 45 F.4th 215 (D.C. Cir. 2022)

The affairs of men are rarely quite a clear-cut as the law attempts to make them. There are nevertheless three additional factors to be observed – first, to what extent we actually have jurisdiction to interrogate and define the concept of "general parliamentary law", second, whether any additional factors must weigh into our assessment of the validity of the subpoena. We are of course required to raise the jurisdictional issue. We raise it because an issue "may be nonjusticiable if it compels the [Court] to interpret an ambiguous House Rule." *United States v. Bowser*, 964 F.3d 26, 34 (D.C. Cir. 2020) (citation and internal quotation marks omitted), because there is "too

great a chance that it will interpret the Rule differently than would the Congress itself; in that circumstance, the court would effectively be making the Rules". *Rostenkowski*, 59 F.3d, at 1306-07. *Shelton II* does not affirmatively deal with the question, however, as we were faced with a different set of facts. There, the appellant was convicted of a criminal offence under 2 U.S.C. § 192. He did not bring the action directly against the subpoena, but against conviction, and as the Court of Appeals correctly observed when Mr Shelton found himself again subpoenaed by Congress and again convicted – even if we learn nothing from the law in disposing of the case at bar we will have discovered that subpoena cases frequently come like busses, "Congress is not a law enforcement or trial agency" *Shelton v. United States*, 404 F.2d 1292, 1297 (D.C. Cir. 1968) [*Shelton III*], and there, like in *Yellin v. United States*, 374 U.S. 109, 83 S.Ct. 1828, 10 L.Ed.2d 778 (1963), the matters came before the judiciary not in challenge of the subpoena but of criminal proceedings brought after the witness refused to answer a question. Even so, that distinction at best is critically different to the one here. In *Yellin* and *Shelton*, the operative rules of procedure which the Courts relied upon had previously been adopted by the relevant House. Here, however, there are no such rules, and we are being called upon to extend the concept of "general parliamentary law" to a new context which has never been addressed by the House of Representatives itself. Of course, if this were an ordinary statutory construction exercise, then we would have no difficulties at all in interpolating and interpreting the authorities – Deschler's, Erskine May, Wickham et al. – and concluding simply that general parliamentary law does not admit such elaborate delegations and subdelegations.

In order to determine whether or not we have jurisdiction to contemplate the validity of the subpoena, therefore, we must consider whether or not the rule is "ambiguous". We cannot accept that just because the defendant House has not adopted any rules whatsoever, this makes everything governing its proceedings which has not already arisen in the past, in what is normally a narrow temporal window between the House first meeting and it adopting the rules, and which has not subsequently been described by a recognised parliamentary authority an "ambiguous" matter – the primary effect of doing so would be to completely immunise the House of Representatives, the transaction of its business, and its members, from any sort of meaningful limitation of their power – in a congressional inquiry, certainly, but also in any number of other congressional procedures. The Rulemaking Clause "simply means that neither we nor the Executive Branch may tell Congress what rules it must adopt. Article I does not alter our judicial responsibility to say what rules Congress may not adopt because of constitutional infirmity." *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1173 (D.C. Cir. 1983). See also *United States v. Ballin*, 144 U.S. 1, 5, 12 S.Ct. 507, 509, 36 L.Ed. 321 (1892). To be sure, the Rulemaking Clause cannot be read as imposing unto congressmen the diligence, however opportune or helpful we may think it, of drafting comprehensive written rules, and we think the clause actively precludes it, for we do not doubt that the House of Representatives has the liberty, and in reality must, for it cannot exhaustively consign every single matter into its rules, to leave certain matters to the sound and rational conduct of its members, to unwritten rules and generally to custom and usage. That much is an invariable part of any complex human institution, including Congress. See e.g. *Christoffel v. United States*, 338 U.S. 84, 91 (1949) ("this Court has the duty to presume

that the conduct of a Congressional Committee, in its usual course of business, conforms to both the written *and unwritten* rules of the House which created it.") (emphasis added).

Here of course, the basic rule itself is unambiguous – normally, Congress must delegate power to a single member before he can exercise it, and even so that power is never truly his but that of the House which he wields for practical purposes, not any other. We have attempted to understand whether or not the Constitution requires that Congressional delegations to one of its members be written and unequivocal. Nothing in our authorities suggest it. Without a doubt, there will be *some* matters so fundamental to our Constitution that we will indeed intervene in a matter of delegation – we do not think that the Congress can delegate its entire power to vote on bills to one or two members, or even a committee, for instance – but we are not certain that the formal requirements that the subpoena be voted upon originate from anything other than the House's own sound judgment of a reasonable course of action and its own rules. The trouble here is that the parliamentary authorities we can point to only discuss general parliamentary law as regards committees tangentially, and almost invariably merely to the effect of suggesting that business can be committed thereto. "This body of general parliamentary law, which is further defined by each new ruling on the subject by the Speaker, has traditionally been construed to embrace those rules of procedure which embody practices of long established custom." 1 *Deschler's Precedents* 60. Careful scrutiny of authority shows, however that this is not all, that there exists a requirement that the procedure admitted under general parliamentary law must be "a necessary part of the organization work of [the] House." 1 *Precedents of the House* 57, n.7. Of

course, what is "necessary" to the work of the House is of course ambiguous.

There is, however, one more distinction between *Rostenkowski* and the case at bar. In *Rostenkowski* and its progeny, the Courts were being invited to interpret positively approved provisions of the House Rules within a judicial context, as they applied to Congressmen and other direct congressional actors. There our Court of Appeals held that "the Rules involved in this case do not provide a "judicially discoverable and manageable standard for" determining" an outcome. *Rostenkowski*, 59 F.3d, at 1306. Here, Congress' own precedents and authorities may guide us towards a solution, one which is not less judicially manageable we think than any normal exercise of interpretation, and the plaintiff is a citizen exterior to the Congress, and we moreover agree with the plaintiff that the procedures of Congress are best describable as lackadaisical. Deciding this matter, however, would strike to the very core of the functioning of Congress, and constitute an impermissible interference with the proceedings of the Congress. Issuance of a subpoena by a committee chairman is not *ipso facto* constitutionally dubious – the only doubt is whether or not doing so *in these circumstances* the issuance of a subpoena falls within "general parliamentary law". The fact, however, that Congress has chosen to entrust itself to "general parliamentary law" does not expose itself, we think, to the vagaries of judicial trampling upon its province and duty. This Court cannot by virtue of that omission or want of diligence, as deeply regrettable as it may be, allow itself to find its way to some comfortable perch just over the Speaker's shoulder. Whilst we understand the plaintiff's frustration at what he claims to be the incompetence of the House of Representatives, the judiciary is not the proper venue in which those concerns may be aired. As a citizen – we

leave aside any additional constraints which may arise from his judicial duties, he may vindicate those concerns through the judicious exercise of the rights afforded to him under the First Amendment. He may vote for persons he sees as better candidates in the next election. He may even stand for office himself. He could, of course, do nothing. Each and every one of these courses of action are afforded to the plaintiff as an American citizen, but he may not successfully ask of this court to impose his vision, or to commend our own vision, of what rules should govern Congressional proceedings unto it, for our judicial power does not allow us to take possession of Clerks' Table for the benefit of our better judgment. To do so is fundamentally repugnant to the very notion of the separation of powers.

Moreover, such a course of action would not enforce the *lex parliamentaria* as it would claim to do – much to the contrary it would succeed only in offending it, for the most fundamental tenet of that branch of law, and we think without a doubt that "the *lex parliamentaria* is a part of the law of the land" *State v. Chandler*, 2 Del. 553, 562 (Del. Gen. Sess. 1837), is that "every deliberative assembly … is and must be the final judge of its own parliamentary law. No doubt the ordinary rules of parliamentary law" *Hill v. Goodwin*, 56 N.H. 441, 453 (N.H. 1876). There is hardly any principle more fundamental and more essential to the very physionomy of parliamentary law than that no other person and no other officer ought to intrude thereupon, but only where that parliamentary law seeks to protrude from the confines of what is properly a rule of procedure into some other domain of the law beyond its reach. See also *Stockdale v. Hansard* (1839) 3 St Tr (NS) 723, 112 Eng. Rep. 1112; *Anderson v. Grossenbacher*, 381 S.W.2d 72, 74 (Tex. Civ. App. 1964) ("The courts will not disturb the ruling on a parliamentary question made by a

deliberative body having all the necessary authority to make rules for its governance and acting within the scope of its powers. In so far as its judgment and direction are uncontrolled by the law of the land, it is free from the control of the courts; but, in so far as its acts are directed by law, it is subject to judicial authority.").

We ultimately do not have jurisdiction to decide whether or not the subpoena was validly issued under "general parliamentary law".

III

Since our entry of summary judgment moots the preliminary injunction, we only briefly look at the other prongs of the preliminary injunction, primarily for the benefit of the parties' comprehension.

A

In order to obtain a preliminary injunction, the movant must show irreparable harm. In order to do so, "[i] the harm must be certain and great, actual and not theoretical, and so imminen[t] that there is a clear and present need for equitable relief to prevent irreparable harm [and, ii] the harm must be beyond remediation." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 7-8 (D.C. Cir. 2016) (quoting in part *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 305 (D.C. Cir. 2006)) (cleaned up).

To be sure, if we deny the preliminary injunction, then in all likelihood – as we would deny the injunction anyway, we shut our mind at this stage to the fact that we are adjudicating this matter today as part of summary judgment – Congress will make arrangements for the plaintiff to testify before it as soon as practicable. Even though he explains that the subpoena was issued "without authority", and that being forced to testify "will allow evidence against the Plaintiff to be

used against him", we are not sure what "irreparable" and "great" injury he will suffer from testifying. Of course, it is true that what he says can be used against him, but then again he can assert his privilege under the Fifth Amendment, *cf. Watkins v. United States*, 354 U.S. 178 (1957), and it will be remembered that refusing to grant the injunction today will not deny him that right. Indeed, the orthodox view is that where a committee of the Congress has issued a subpoena … without defining the questions to be asked, the judicial branch of the Government should not enjoin in advance the holding of the hearing or suspend the subpoena [, for the] rights of witnesses in respect of any question actually asked at the hearing are subject to determination in appropriate proceedings thereafter." *Mins et al. v McCarthy*, 209 F2d 307 (D.C. Cir. 1953) (*per curiam*). Beyond that one injury, however, it is hard to see how an injury could be "great". General assertions of injury to rights are not irreparable harm in the context of a Congressional subpoena. *Cf. Ashland Oil, Inc. v. FTC*, 409 F. Supp. 297 (D.D.C. 1976). In fact, the petitioner does not make any further argument other than what will inherently result from the injury which will occur from his being required to testify, other than the fact that the subpoena is illegal and that being forced to testify under illegal subpoena will engender harm. The inconvenience of being required to testify is not, *ipso facto*, a form of irreparable harm, for like the expense and inconvenience of litigation, being required, as a public office holder, even a judge, to be expected to adhere to basic standards of integrity, this is "part of the social burden of living under government, and does not constitute irreparable injury" *Marine Wonderland Animal Park, v. Kreps*, 610 F.2d 947, 950 (D.C. Cir. 1979) (quoting *Petroleum Exploration, Inc. v. Public Service Commission*, 304 U.S. 209, 222, 58 S.Ct. 834, 841, 82 L.Ed. 1294 (1938)) (internal

quotation marks omitted), bar the presence of particular circumstances. Whilst it is certainly axiomatic that the independence of the judiciary be preserved, it is not irreparable harm for the Congress to enquire, whether generally as part of a legislative inquiry, or individually as part of an impeachment proceeding, into questions of judicial ethics and probity. Indeed, "to show irreparable harm "[a] plaintiff must do more than merely allege . . . harm sufficient to establish standing" *In re Navy Chaplaincy*, 534 F.3d 756, 766 (D.C. Cir. 2008) (quoting *Associated Gen. Contractors of Cat, Inc. v. Coal, for Econ. Equity*, 950 F.2d 1401, 1410 (9th Cir. 1991)). See also *John Doe Co. v. Consumer Fin. Prot. Bureau*, 849 F.3d 1129, 1135 (D.C. Cir. 2017) (Holding that "[i]n the absence of "immediate or ongoing harm stemming from the [government's] alleged constitutional defects," the "violation of separation of powers" by itself is not invariably an irreparable injury.") (quoting in part *In re al-Nashiri*, 791 F.3d 71, 79–80 (D.C. Cir. 2015)).

We now consider the public interest. There is of course a public interest in preserving the separation of powers. The Supreme Court has also recognised a "vital state interest in safeguarding public confidence in the fairness and integrity" of the judiciary. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 445, 135 S.Ct. 1656, 191 L.Ed.2d 570 (2015) (quoting in part *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009)) (internal quotation marks omitted). There is no public interest, however, in preventing a congressional inquiry from hearing a specific person it deems useful to hear when Congress acts *intra vires* as part of an endeavour to inform its legislative efforts.

Accordingly, had the motion not been mooted by the entry of summary judgment, we would have denied the motion for a preliminary injunction.

B

We turn next to the entry of summary judgment. For reasons that will have been made clear in Part II-B of this opinion and order, the better part of the plaintiff's arguments are unusual, although perhaps unfortunately not entirely novel. Whilst we commend the intellectual creativity of the plaintiff, his arguments are for the most part unfortunately not supported by authority. On the question of the subpoena delegation, we are without jurisdiction for the reasons we have explained in Part II-C of the question, for far from from protecting the separation of powers, deciding it would entail an unprecedented interference in legislative business completely unwarranted by, and impermissible to, the Constitution.

The House of Representatives is free, of course, to adopt clear rules to govern its proceedings. Doing so will undoubtedly avoid the complexity, protraction and delay of litigation whose principal absent quality is pellucidity which, in fairness to the plaintiff, is intrinsically associated with the novel manner in which this subpoena was issued to him, and, we think, be of utility to the efficacious transaction of Congressional business. Whether it does so, however, and what those rules should contain, is not a matter for the judicial department to decide. Accordingly, since we lack jurisdiction over that part of the suit, we dismiss it, and grant summary judgment as to the remainder thereof.

C

As a final matter, in the interests of the economy of this court and the parties' time while taking the motion under advisement, we indicate that *should* the plaintiff file a motion for a stay pending an appeal, it will most likely be granted. In making this indication now, we also allow counsel for both parties an opportunity to more quickly raise arguments in support of their respective positions. We decline to grant it now, *sua sponte*, absent an intent from the plaintiff to file a petition for a writ of certiorari, for we perceive no reason in delaying justice to the defendant for any longer.

Even though the standard that most appellate courts, including the Supreme Court, adopt for a stay pending appeal is functionally identical to that for a preliminary injunction, *cf. Washington Metro. Area, Etc. v. Holiday Tours*, 559 F.2d 841, 844 (D.C. Cir. 1977) (Setting out a standard for "interim injunctive relief, whether by preliminary injunction or by stay pending appeal"), and we would have denied it even if it were not mooted, the Supreme Court "has begun to grant such stays with notable frequency" *Little v. Idaho*, 140 S. Ct. 2616, 2618 n.1 (2020) (SOTOMAYOR, J., dissenting in part and concurring in part). Even so, we are mindful that "[w]here a party seeks a stay pending certiorari, as here, the applicant satisfies the [likelihood on the merits] factor only if it can show both "a reasonable probability that certiorari will be granted" and "a significant possibility that the judgment below will be reversed."" *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2089 (2017) (THOMAS, J., dissenting and concurring in part) (quoting in part *Barnes v. E–Systems, Inc. Group Hospital Medical & Surgical Ins. Plan*, 501 U.S. 1301, 1302, 112 S.Ct. 1, 115 L.Ed.2d 1087 (1991) (SCALIA, J., in chambers)). Of course, this

brings with it the unpleasant role of second-guessing what other judges are likely to think. Even so, we think that there is a high possibility, not least because the questions presented in this action are of great interest to most members Supreme Court – including the plaintiff, a majority of judges on that court have been served, that it will be inclined to grant review such that it may reconsider the issues itself. Furthermore, because this action relates some of the most fundamental tenets of our Constitution, we are inclined to believe that it presents an "important federal question", Sup. Ct. R. 10. Quite naturally, because we take a dim view of the plaintiff's likelihood to prevail on the merits we do not think that there is a significant possibility that our judgment would be reversed.

Most importantly, and unlike with the preliminary injunction, granting a stay now will work strongly in the public interest by preventing the last-minute uncertainty should the defendant attempt to conduct the hearing before the Supreme Court has had a chance to review the papers, and placing the Applications Justice in the unenviable position of having to deny or grant a stay without being aware of the full action. See *Barr v. Lee*, 140 S. Ct. 2590 (2020). Applying the D.C. Circuit's "sliding scale" balancing test, *cf. Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1317-18 (D.C. Cir. 1998), we think that the very strong public interest in avoiding dramatic last-minute stays, and the high likelihood that the Supreme Court will grant review, and the short duration of this further stay, only long enough so that the Supreme Court may meaningfully examine a new motion for a stay before it, narrowly cause for the balance of the four stay/injunction factors to tilt in favour of the plaintiff.

Naturally, if we grant it, this stay will dissolve in one of the following circumstances: as soon as the Supreme Court has had the chance to rule on a stay (regardless of whether it grants it or not), if certiorari is denied, or otherwise after the passage of 24 hours.

* * * * *

ORDER

For the foregoing reasons, the court orders as follows:

1. The temporary restraining order entered by this court on the 29th November is **dissolved**.

2. The motion for a preliminary injunction is **denied as moot**.

3. The motion to dismiss for want of subject matter jurisdiction (sovereign immunity) is **denied**.

4. The action is **dismissed *sua sponte*** for want of justiciability as concerns the claims relating to the lack of a vote as to the subpoena.

5. The summary judgment is entered *sua sponte* **in favour of the defendant** as concerns the remainder of the action.

6. The court **reserves jurisdiction** on any motion for sanctions or costs, to enforce the judgment, to vary or set aside judgment or to stay pending appeal, and on any other miscellaneous matter resulting from its order.

It is so ORDERED,

3rd December 2023

/s/Newplayerqwerty

CUSDJ